NOTES

RES IPSA LOQUITUR IN AIR LAW.—A recent case suggests the applicability of the doctrine of *res ipsa loquitur* to airplane accidents and thus raises occasion for speculation as to the future development of the law in this direction. In *Sollak* v. *New York*,[1] plaintiff recovered for personal injuries received in a collision between an airplane and an automobile. The evidence disclosed that while the automobile in which plaintiff was riding was proceeding along a public highway near a flying field, a plane operated by defendant's officer collided with the automobile producing the injuries complained of. This, together with proof of the nature and extent of the injuries constituted all the evidence. Plaintiff contended that in the absence of any explanation on the part of the state as to how the collision occurred, the doctrine of *res ipsa loquitur* must be applied. It seems that the doctrine was applied.

Investigation discloses no other case where the doctrine has been successfully resorted to by plaintiff to establish defendant's liability for injuries received in an airplane accident. It will be remembered that it is only where the action is founded on negligence that the problem is presented. Where the action is based upon some breach of a positive duty other than the duty to exercise care, it is inapplicable. In actions for damage to person or property caused by flying over land of another, there is an absolute liability imposed both by the common law[2] and by the Uniform State Statute.[3] In actions for injuries to spectators at public exhibitions, those responsible for the exhibition may be liable for the breach of some duty imposed by statute or ordinance or for a failure to provide a reasonably safe place for the invitees.[4]

In *Seaman* v. *Curtiss Flying Service*,[5] recovery was denied in an action brought for the death of plaintiff's intestate caused by defendant's negligence. The evidence disclosed that the deceased was riding in defendant's plane, operated by defendant's pilot when the plane went into a nose dive and crashed. There was apparently some evidence of negligent operation of the plane and some evidence tending to show that it had been carefully operated and that the accident was caused by an act of God, *viz.*, an air pocket which a reasonably prudent pilot could not foresee. There were the ordinary instructions to the jury placing the burden of obtaining an affirmative verdict on both the issue of negligence and the issue of cause. The jury found for the defendant.

Nothing was said in this case about the doctrine of *res ipsa loquitur* and it appeared that plaintiff relied upon proof of specific acts of negligence. While this would prevent him from relying upon the doctrine of *res ipsa loquitur* in some few jurisdictions,[6] it would not bar the application of that doctrine under the rule

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[1]1929 U. S. Av. R. 42 (N. Y. Ct. Cl. 1927).
[2]See POLLOCK, TORTS (13th ed.) 361 ff.
[3]Uniform State Law for Aeronautics, § 5.
[4]Platt v. Erie County Agriculture Society, 164 App. Div. 99, 149 N. Y. Supp. 520, 1928 U. S. Av. R. 116 (1914).
[5]1929 U. S. Av. R. 48 (N. Y. Sup. Ct. Suffolk Co., Trial Term, 1929).
[6]Kennedy v. Metropolitan St. Ry. Co., 128 Mo. 297, 107 S. W. 16 (1907); Bogress v. Wabash R. R. Co., 266 S. W. 333 (Mo. App. 1924).

applied in most courts.[7] The case got to the jury, it is true, and where the effect of *res ipsa* is merely to make out a jury case,[8] it would be immaterial here. Where it required defendant to come forward with evidence tending to explain the accident[9] or, as in some jurisdictions where it cast upon defendant the burden of proving due care,[10] its application might have produced a different result. Were evidence required from defendant of due care, plaintiff would be entitled to a direction in case of failure by defendant to produce such proof.[11] Were the burden of proof cast on defendant, plaintiff would be entitled to a direction in case of a failure by defendant to offer any proof, and in any event plaintiff would be entitled to an instruction that the jury must affirmatively find due care before it could return a verdict for defendant.

Since the question of *res ipsa* was not presented, the case is no authority either way. It was found that defendant was not a common carrier, but this would go only to the degree of care required to avoid negligence and would not affect the manner of proving negligence.

Here are two types of accidents that might raise the question of the application of the presumption of negligence involved in *res ipsa loquitur:* (1) accidents, collisions, etc., resulting in injuries to person or property on the public highways, as in the *Sollak* case; (2) accidents resulting in the death or injury of passengers in airplanes. The *Sollak* case apparently applies the doctrine in the first type. The *Seaman* case apparently does not touch the question of its application.

Now the conditions for the application of this doctrine must not be lost sight of. In the first place, the instrument or agency which is the occasion for the injury must be within the exclusive control of defendant, both at the time of the injury and at the time of the alleged negligence.[12] The reason for this is not far to seek. *Res ipsa loquitur* actually raises a double presumption. It raises a presumption of negligence and a presumption that defendant's negligence was the legal cause of the injury. The latter is sometimes denied,[13] but what is actually intended is that there is no presumption that defendant's acts were the cause in fact of the injury.[14] Now, if the instrument or agency which precipitated the injury is not under the exclusive control of defendant, the basis for the presumption of legal cause fails. The injury might just as readily be caused by the negli-

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[7]Walters v. Seattle R. & S. Ry. Co., 48 Wash. 233, 93 Pac. 419 (1908); Firszt v. Capitol Park Realty Co., 198 Conn. 627, 120 Atl. 300 (1923); Washington-Virginia Ry. Co. v. Bouknight, 113 Va. 696, 75 S. E. 1032 (1912); McNamara v. Boston & Me. R. R. Co., 202 Mass. 991, 89 N. E. 131 (1909); Clarke v. Nassau Electric Ry. Co., 9 App. Div. 51, 41 N. Y. Supp. 78 (1896).

[8]Ross v. Double Shoals Cotton Mills, 140 N. C. 115, 52 S. E. 121 (1905); Dunn v. Roper Lumber Co., 172 N. C. 129, 90 S. E. 18 (1916). See Harper and Heckel, *Effect of the Doctrine of Res Ipsa Loquitur* (1928) 22 ILL. L. REV. 724, 732 ff.

[9]See Slater v. Barnes, 241 N. Y. 284, 149 N. E. 859 (1925). But see Griffin v. Manice, 166 N. Y. 188, 59 N. E. 925 (1901). See Harper and Heckel, *supra* note 8, at 734.

[10]Southwestern Tel. & Tel. Co. v. Bruce, 89 Ark. 589, 117 S. W. 56 (1909); Warren v. Mo. & Kan. Tel. Co., 196 Mo. App. 549, 196 S. W. 1030 (1917).

[11]See Harper and Heckel, *supra* note 8, at 738 ff.

[12]Sandler v. Garrison, 249 N. Y. 236, 164 N. E. 36 (1928).

[13]Pittsburg C. C. & St. L. v. Arnott, 189 Ind. 350, 369, 126 N. E. 13 (1920).

[14]See Scellars v. Universal Service Everywhere, 68 Cal. App. 252, 228 Pac. 879 (1924).

gence of a third party as by defendant's presumed negligence.[15] Where the inferences will support the one as well as the other hypothesis, the usual and general rule applies and plaintiff must make out a *prima facie* case by actual proof. In other words, the orthodox rule as to circumstantial evidence applies and plaintiff is deprived of the specific presumption which made proof of the accident under the circumstances sufficient to constitute a jury case.[16]

In the next place, the doctrine of *res ipsa* is based upon the theory and is confined to situations of such a nature that the negligence of the defendant is the most reasonable explanation of the accident. The leading English case[17] involved a claim for damages for an injury sustained by a barrel falling from a window above the sidewalk. There was no evidence of negligence for the plaintiff knew nothing except that he was struck by the falling object. It was held, however, in the Exchequer that plaintiff need offer no proof of negligence to make out a *prima facie* case. Barrels, thought the Chief Baron, did not roll out of warehouses without negligence on the part of someone. In view, then, of the ordinary experience of mankind that such incidents are ordinarily the result of negligence, the jury might so find on mere proof of the injury under the circumstances. If there has in fact been no negligence on[18] the part of the defendant, he is required, at least in some jurisdictions, to come forward with the evidence since the explanation of the accident lies solely within his or his servants' knowledge.

Are these conditions present in the two types of accidents mentioned above? In both situations, the control and management of the airplane is exclusively within defendant's power. If there has been any negligence, it is negligence for which defendant is liable. In both situations, it would, no doubt, be fair to require the defendant to produce any evidence bearing on the question of due care, since the facts are peculiarly within his knowledge or the knowledge of his servants.

As to the proposition that defendant's negligence is the most reasonable explanation of the accident, however, there is genuine doubt. In the type of situation illustrated by the *Sollak* case, it may very well be that a collision between persons travelling on the public highway and an airplane would be extraordinary without some negligence. Like the falling of the barrel, it would be rare unless some one were at fault. It may be quite satisfactory, then, to apply *res ipsa loquitur* here. But as to injuries to passengers, the situation is different. True, the doctrine is regularly applied to accidents in which railroad passengers are injured.[19] But here again, experience will support the law. Railroad accidents are now rare unless someone is guilty of a neglect of duty. Science and industry have surrounded rail travel with so many safeguards that one can confidently look for a negligent employe or operator to explain most accidents.

It is certainly otherwise with respect to travel by air. The hazards are still great and it probably is not true that most airplane accidents are due to some

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[15]See Larrabie v. Des Moines Tent Co., 189 Iowa 319, 178 N. W. 373 (1920).

[16]*Cf.* Harper and Harper, *Establishing Railroad Liability for Fires* (1929) 77 U. OF PA. L. REV. 629, 630 ff.

[17]Byrne v. Boadle, 2 H. & C. 722, 159 Eng. Rep. 299 (1863).

[18]See *supra* notes 9, 10.

[19]See CLARK AND LINDSEL, TORTS (8th ed.) p. 450 ff.

one's negligence. On the other hand, it is probably true that comparatively few such accidents are due to negligence. Passengers know the hazards and know well that the greatest ones are conditions which man and science have not yet mastered. To apply the doctrine of *res ipsa* to this type of accident at the present stage of the development of air travel, would seem to ignore the pragmatic bases of the principle and subject those who operate aircraft to unduely severe liability. Such an application would raise a presumption that defendant was negligent in the operation of the craft and that such negligence was the legal cause of the accident. Experience, to date, does not justify such a rule of liability. It assumes that this explanation of the accident is more reasonable and more likely to be accurate than some other explanation, such as an air pocket, act of God, condition of the atmosphere, or other causes. In the course of time when travel by air has become as safe as travel by rail, and after man has mastered the hazards of this method of transportation, it may very well be that the doctrine of *res ipsa loquitur* will be properly applicable to this situation. At the present time, it is submitted, it will be unjustifiable. The law will grow, but it should grow with the development of the industry. It should not be wiser than the experience of mankind.

Most important of all, there is as yet no particularly vital social policy involved in facilitating recovery on the part of those injured while passengers. While it is obvious that defendants who operate aircraft should be held to a high degree of care, there is no pressing need for raising presumptions against defendants. It is otherwise, however, when plaintiff is injured while making ordinary use of the highway. Accordingly, it is submitted that the *Sollak* case is sound and that *res ipsa loquitur* should regularly apply in this type of case. But until travel by air is much safer than it now is or until there is more necessity than there now appears for protecting the public that travels by air, it would seem unsatisfactory to extend its application to the ordinary airplane accident.

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MUNICIPAL AIRPORT AS A PARK PURPOSE.—Although the legislatures in the various states, in response to what was at the time an apparently universal demand, have adequately conferred upon municipalities the requisite authority to acquire and maintain airports, the actual realization of these powers in many instances has not been entirely unopposed. This opposition, however, has not always been based upon the absence of the power of the municipality in the particular case to establish an airport, but upon the attempt of the municipality to establish an airport by indirectly invoking other delegated powers, such as the power to establish parks.

Because of the various constitutional and statutory safeguards against the unauthorized expenditure of public moneys and the improvident accumulation of excessive indebtedness, the financing of a municipal airport program, in most jurisdictions, depends primarily upon the consent of the qualified electors ob-

tained at an election held for that purpose. Whether such approval is deemed by the local authorities to be more readily obtainable when presented in the form of a park program with an airport as a merely incidental objective rather than as a clear-cut proposal for the acquisition of an airport, or whether such approach is adopted as an expedient to avoid the application of unfavorable statutory restrictions, or for other local reasons, the attempts to establish municipal airports in this manner have furnished the basis for litigation attacking the validity of the procedure.

A case, involving such a situation, was recently presented before the Supreme Court of Oklahoma in *Schmoldt* v. *Oklahoma City*.[1] As appears from the facts of the case, at an election held on July 30, 1929, a majority of the qualified property owners and taxpaying voters of Oklahoma City had approved an issuance of bonds to provide funds for the purpose of acquiring, owning, maintaining and beautifying real property for public parks with the privilege of locating thereon aviation airports with all necessary and proper equipment, buildings and appurtenances thereto. It was for the purpose of testing the validity of these bonds that the action in this case was brought.

In a previous litigation directed against the validity of these same bonds[2] it had been held that the title of the ordinance submitting the bond issue was not misleading, and that the city of Oklahoma City, under existing statutory provisions, had the authority to acquire and operate a municipal airport. Accordingly, the question presented in the instant case was not whether Oklahoma City had the power to acquire and operate an airport or whether a bond issue submitted for approval by the electors for such a purpose was valid, but solely whether or not said city had the right to use any portion of the funds, derived from the sale of bonds voted to purchase or maintain a park, in constructing an airport. The determination of this question depended upon the applicability of certain provisions of the state constitution pertaining to the debt incurring powers of municipalities. Under section 26, article 10, of the Oklahoma Constitution no municipality can create an indebtedness in excess of the income and revenue for the current year unless authorized by *three-fifths* of the voters thereof, voting at an election held for that purpose, such debt in no event to exceed five *per centum* of the valuation of taxable property as assessed for the previous year. However, in the case of creating indebtedness for the purpose of purchasing or constructing public utilities the limitation under section 26, article 10, is removed by section 27 of that article providing only that a *majority* of the qualified property tax paying voters approve the same at an election held for that purpose.

In view of the fact that the bonds in the instant case were not approved by *three-fifths* of the voters as required by section 26 of the constitution but merely by a majority as would be sufficient under section 27, the ultimate and decisive question in the case was whether or not the purpose of the bond issue was a "public utility" within the purview of section 27 of the constitution.

In answering this question in the affirmative the Oklahoma Supreme Court did not place its decision on the express ground that an airport is a "public

[1]U. S. Daily, Sept. 22, 1930, at 2250 (decided Sept. 9, 1930).
[2]Ruth v. Oklahoma, 287 Pac. 406 (Okla. 1930).

utility" within the purview of the constitution, but reached its conclusion in reliance upon the authorities in that jurisdiction holding a public park to be such a public utility and the decisions in other states, mainly the case of *City of Wichita* v. *Clapp*,[3] holding that an airport is a park purpose.

Making due allowance for the generally prevalent fervor for the development of American aviation and, more particularly, for the enthusiasm as manifested in the prevailing opinion in the case under consideration, it is submitted that the conclusion reached is unsound and subversive of constitutional provisions designed to safeguard the public interest.

Since an early day in the development of municipal airports much emphasis has been placed upon the similarity between such areas and parks and the desirability of combining these municipal activities. The legislatures, reflecting the enthusiasm and desires of the day for the developemnt of aeronautics, seized upon this supposed compatibility of utility as a convenient method of promoting such growth, and much of the early legislation treats of parks and airports conjunctively in the same acts.

At that time, a bare half dozen years ago, when civil aviation in this country was still an activity for the pioneer, the concept of a municipal airport was a totally different thing from that into which it has developed. The modern busy airport of today with the roar of the motors of planes landing and taking off and circling overhead; the warming up and testing of motors on stationary planes; the noises of the machine shop and the innumerable other disturbances incidental to a well-equipped landing field, presents a picture entirely foreign to every connotation of a park, save, perhaps, that of entertainment from the novelty of the exhibition; a feature destined to be of relative unimportance, if not non-existent, in the very near future.

It is, of course, true as stated by the court,

"that the erection of museums, art galleries, zoological and botanical gardens, conservatories, auditoriums, veterans' memorial halls, tennis courts, swimming pools and the like in public parks, is common and that their establishment has not been regarded as a diversion from legitimate park uses."

But these activities not only illustrate what have been held to be legitimate park purposes, but the very character and scope of the enumeration would seem to conclusively exclude an airport as an activity consistent with park purposes.

While it is also true that the uses to which a park may be put are gradually expanding in conformity with the development of science and art, such expansion must be consistent with and not destructive of the purposes for which parks were originally established. It seems questionable, to say the least, that human nature, its desires and enjoyments, have been so remarkably revolutionized in the last few years as to warrant the conclusion reached by the court:

"That the public would receive much more pleasure, recreation, amusement and benefit . . . to see an airplane glide gently to the earth and take to the air again as gracefully as an eagle in its flight, and ponder over the wonderful accomplishments of the airplane . . . than they would strolling through a zoological garden viewing the reptiles, fowls, and animals."

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[3]125 Kan. 100, 263 Pac. 12 (1928).

Of course the objections herein adverted to would be obviated if it were possible to so divide an acquired area as to keep the airport activity entirely separate from that portion set aside for park purposes. This was evidently in the minds of the Supreme Court of Kansas in holding in the *Wichita* case that the "devotion of a *reasonable portion* of a public park" to an aviation field was a legitimate park purpose. And the court in the instant case likewise expressly states that:

"of course, the funds derived from the sale of the bonds involved in this action must be used for the purposes designated, and such landing fields, hangars, or buildings as may be constructed must be ancillary to the complete enjoyment by the public of the property set apart for their benefit."

Having in mind the present area requirements of even an average sized landing field, with the necessary encroachment upon adjoining territory in landing and taking off, it is difficult to see how this "ancillary" relationship can be maintained. On the contrary, the very reverse must be the inevitable result, and the area aside from the airport become a mere adjunct thereto.

In short, it is submitted in view of the demands of present day aviation, that a park cannot properly be used as an airport any more than an airport can be used as a park, and that these municipal functions must be carried on as distinct activities in separate areas designed and established for their respective and particular uses.

That an airport is within the proper scope of municipal activity, and, when validly authorized by the persons who are to bear the burdens, a proper object for the expenditure of public money, cannot at this day be legally questioned. But the accomplishment of such a program in the manner and under the circumstances involved in this case does violence to well-settled rules of law designed to safeguard and maintain the interests of the public in its parks, and cannot be justified, particularly when, in the words of the dissenting judge,

"the only excuse in calling it a bond issue for park purposes is to create a legal peg upon which to hang an unauthorized indebtedness."

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